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U.S. Department of Homeland Security

Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536

[redacted]

FEB 26 2004

File: LIN 02 278 52252 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker or professional. The petitioner is an import/export firm. It seeks to employ the beneficiary permanently in the United States as an assistant controller. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits copies of the petitioner's bank statements and asserts that the director failed to adequately review the petitioner's tax returns and other financial information.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii) additionally provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g) also provides in pertinent part:

> (2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

The sole issue raised on appeal is whether the petitioner has established its continuing ability to pay the beneficiary's offered wage. Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is April 7, 1998. The beneficiary's salary as stated on the approved labor certification is $82,380 annually.

As evidence of its evidence of its ability to pay the proffered wage, the petitioner submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for the year 2001. This return indicates that the petitioner claimed a taxable income before the net operating loss (NOL) deduction and other special deductions of $88,072. Schedule L reflects that the petitioner had $87,787 in net current assets during that year. Either sum was sufficient to meet the beneficiary's offered salary of $82,380 during this period.

On October 22, 2002, the director requested additional evidence of the petitioner's ability to pay the proffered wage from the visa priority date of April 7, 1998 and continuing until the present, pursuant to the requirements of 8 C.F.R. § 204.5(g)(2).

Included in the petitioner's response, were copies of its Form 1120, U.S. Corporation Income Tax Return for the years 1998 through 2000. The 1998 return reflects that the petitioner declared a taxable income before the NOL deduction and other special deductions of $1,441. Schedule L of this tax return also reflected that the petitioner had $45,306 in net current assets. Neither figure was sufficient to cover the beneficiary's proffered wage and failed to demonstrate the petitioner's ability to pay the offered wage during this period.

The petitioner's 1999 federal corporate tax return shows that the petitioner had a taxable income before the NOL deduction and other special deductions of $10,380. Schedule L of the tax return shows that the petitioner had $25,108 in net current assets. The petitioner's ability to pay the beneficiary's proposed salary was not demonstrated by either its income or its net current assets for this year.

The petitioner's 2000 federal corporate tax return shows that the petitioner declared a taxable income before the NOL deduction and other special deductions of -$14,732. Schedule L of this return indicates that the petitioner had $70,576 in net current assets. Neither figure was sufficient to cover the beneficiary's offered salary for this year.

In denying the petition, the director concluded that the petitioner's tax returns failed to demonstrate the petitioner's continuing ability to pay the offered wage.

On appeal, the petitioner, through counsel submits copies of the petitioner's bank statements covering extracts of periods between March 1, 1998 and February 28, 2003. The petitioner contends that these records establish that the petitioner has had a sufficient cash flow available to pay the beneficiary's offered wage. There has been no proof presented, however, to show that the balances relevant to the periods covered by the petitioner's submitted tax returns somehow represent additional funds beyond those figures presented in the petitioner's returns. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972). It is also noted that 8 C.F.R. § 204.5(g)(2) requires evidence in the form of audited financial statements, federal tax returns or annual reports. While additional material may be considered, such documentation generally cannot substitute for the fundamental evidentiary requirements. It would need to provide sufficient independent probative value in order to be accepted as competent evidence.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS (formerly INS) had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava,* 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman,* 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh,* 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983). In this case, only one year reflected by the petitioner's tax returns indicates that the beneficiary's proffered wage could be met by the petitioner's taxable income or net current assets. As noted above, 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate a *continuing* ability to pay the proffered wage be demonstrated as of the visa priority date. (Emphasis added).

In the context of the financial records contained in the record, counsel asserts that *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. That case relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. No unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa.* Counsel's contention that the mere addition of the beneficiary to the petitioner's business will increase revenues is not supported by any evidence in the record and is too speculative for consideration.

Based on the evidence contained in the record and after consideration of the financial data further presented on appeal, we cannot conclude that the petitioner has demonstrated its ability to pay the proffered as of the priority date of the petition and continuing until the present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.